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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DIVERSIFIED INVESTMENT PROPERTIES, INC.
AND SABER DEVELOPMENT CORPORATION

PETITIONERS

V.

HOMART DEVELOPMENT COMPANY

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI OF PETITIONERS DIVERSIFIED INVESTMENT PROPERTIES, INC. AND SABER DEVELOPMENT CORPORATION

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85 pp

QUESTIONS PRESENTED

1. Whether the trial court has the authority to ignore or omit material issues of fact, and whether such conduct by the Court [below] is violative of the fairness concepts embodied in the Constitution and the settled law of this Honorable Court.

2. Whether the trail court has the authority upon which to find a Partnership had terminated, on the basis of a mistaken belief that certain land had been sold, when, in fact, no sale had ever taken place.

3. Whether a letter appearing to have been fraudulently prepared for purposes of the suit in the Court below, may be the basis for ruling that a Partnership actually NEVER existed, despite voluminous and highly credible evidence that a Partnership in fact

did exist, such evidence to include hand-written documentation prepared by the opposing side in the case at bar, as well as other writings which specified division of profits and expenses between the Partners, Joint filings of offers to purchase the real property, and numerous other demonstrations evidencing the establishment and on-going existence of a Partnership.

4. Whether the trial court below can, su sponte, refuse to consider or otherwise ignore the customs, practices, and terms of art of the particular industry, ie; the shopping mall/shopping center development business, by refusing to consider the import of expert testimony regarding the aforesaid customs, practices and terms of art in determining that such customs are usual and

ordinary in such business so that a Partnership, established by verbal agreements, shall continue in force and effect during a long-term period of time.

5. Whether the court committed a gross miscarriage of justice by denying the holding of a trial on the merits of the issues raised by the Complaint filed below, simply by deciding, quite mistakenly, that a 29 month absence of activity involving dealings by and between the Partners, in and of itself, was sufficient to justify a finding that the Partnership, if it ever existed, terminated, even though there was an abundance of evidence in the record to refute and demolish such a claim of non-activity between the Partners.

6. Whether the long-established rule of law that Summary Judgment is not proper where there is ANY material question of fact in issue, and the further proposition that the party moving for Summary Judgment has the burden of proving such lack of any fact question, and that the Court has the duty and burden to deny a Summary Judgement if there is any possibility that a material question of fact exists, has been wholly and in this case, irrevocably denied, abandoned, and departed from, thereby resulting in the most irreparable form of damage that can accrue to a litigant.

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Petitioner, Diversified Investment Properties, Inc, and ("Diversified") and Saber Development Corporation ("Saber"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the order of dismissal by

the United States District Court for the Southern District of Florida in favor of Homart Development Corporation ("Homart") on Diversified's and Homart's claims of breach of partnership agreement, breach of fiduciary duty, and breach of good faith and fair dealing.

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals appears as Appendix A to this Petition. The order of the Court of Appeals denying petitioners application for rehearing is included by reference. The unpublished written opinion of the District Court for the Southern District of Florida appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals affirmation of the lower court's opinion in this matter was filed on

April 17, 1992 (App-A). A timely Petition for Rehearing was filed on May 5, 1992. The Court of Appeals denial of the Petition for Rehearing was issued on July 16, 1992. This Court's jurisdiction is invoked under title 28 USC 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a. Amendment 1 to the United States Constitution

"Access to the Courts and equal protection"

b. Amendment 4 and 5 of the United States Constitution

Fairness Concepts

c. Federal Rules of Civil Procedure, Rule 56

STATEMENT OF THE CASE

This case was filed in 17th Judicial Circuit in and for Broward County, Florida in

September of 1988. The respondent filed a petition for removal to the Southern District of Florida which was granted on May 29, 1989. That court claimed jurisdiction pursuant to 28 U.S. C. 1331.

This matter was originally filed by Saber Development and Diversified Properties against Homart. The suit alleges, intera alia, that Diversified acting as a shopping center broker discovered a regional mall site and, proposed the purchase and the development of said site to Saber Development. Saber acting through Stan Aber indicated that it wanted to purchase and develop the property with a department-store type partner whereupon Saber, again acting through Stan Aber, contacted defendant Homart (Homart is the real estate arm of Sears Roebuck and Caldwell Banker). Homart agreed to co-venture/joint-venture the purchase of the regional mall site with Saber Development. Based on the mutual agreement

between the Homart and Saber Group, a partnership was formed by oral agreement for the purpose of purchasing the regional mall site and then developing it. To that end, the partners made many interstate trips, from their respective headquarters for the purpose of acquiring this land from the seller. The parties made 5 separate trips, took aerial photos, spent thousands of dollars, sent many proposals (written and oral) to the seller (directly and through the broker, plaintiff diversified). In fact, Defendant Homart at all times referred to the Homart-Saber Partnership to third parties and insisted that the parties represent themselves as a partnership and made many writings which memorialized its understanding and representation to third parties that it ("Defendant Homart") and plaintiff ("Saber Development") were "PARTNERS" (App.-C,D,H). There came a point in time when the seller entered into an agreement to sell the regional mall site to a third party,

Cadillac-Fairview. After a period of time, the deal to sell the land to Cadillac-Fairview was cancelled. Thus, the site which was the object of the Homart/Saber Partnership was still available to the Partnership and, the Partnership still had ample opportunity to fulfill its site purchase and mall development objectives. Unfortunately for Saber, Homart, IN VIOLATION OF ITS FIDUCIARY DUTY TO ITS PARTNER, SABER, did not apprise Saber that the Cadillac-Fairview deal had terminated and that the land was still on the open market. Instead Homart, AGAIN IN VIOLATION OF ITS FIDUCIARY DUTY TO ITS PARTNER, SABER, secretly arranged to buy the site from the seller, by forming an oral agreement with Edward Debartolo to purchase and develop the site. Homart/Debartolo, succeeded in purchasing the site and then proceeded to develop the site into a mall. When Saber Development found out that its partner for the site (Homart) had diverted its partnership interest by

secretly acquiring the site, Saber took steps to redress Homart's breach of fiduciary duty to Saber and breach of oral agreement to purchase and develop the land with Saber.

Plaintiff Diversified, a shopping center real estate firm acting as the broker, had originally found the site and introduced it to Saber, and consequently its partner, defendant Homart. Saber and Homart, representing themselves as a partnership to Diversified, agreed to pay Diversified 10% of the sale price. The Homart/Saber Partnership also agreed to give Diversified exclusive leasing rights for the non-anchor (department stores) tenants in consideration of Diversified's role in finding and developing the proposed deal between the Saber/Homart partnership and the seller. Homart ended up purchasing the site and developing the Mall but, never paid Diversified any brokerage commission and, did not give Diversified exclusive leasing rights. Diversified,

together with the Saber portion of the Saber/Homart Partnership, contemporaneously took action to redress the above mentioned breaches which resulted in the instant action.

FINDINGS OF THE FIRST COURT & ACTIONS OF THE SECOND COURT

The lower court entered summary judgement against Saber because it failed to consider and/or was unaware of the **material facts** in issue which, on their face, show that a partnership was formed by Saber/Homart. The Lower Court relied on a letter which Defendant claims it sent to Saber as evidence that they were not partners. However, the lower court failed to consider material evidence proffered by plaintiffs which showed that the letter was probably prepared by Homart for use in this suit (App. H-1, S. Aber, C, D, H). The Lower Court entered summary judgment against plaintiffs Saber and Diversified by failing to consider material facts, omitting material facts, and

misinterpreting the terms and customs common in the business which is the subject of the suit (ie: how partnerships are formed by oral agreement. The misuse of material facts in granting summary judgment against plaintiffs is further compounded because facts are to be viewed in the light most favorable to plaintiff. United States v. Diebold Inc., 369 U.S. 654, 655 (1962). A violation of such a fundamental right, guaranteed by the Highest Court in the Nation must be corrected by granting certorari in this case. The Appellate Court further erred which resulted in a miscarriage of justice by failing to make an independent review of the record. Plaintiff also suggests that the appellate court's review was unfair because one of the appellate court judges at oral argument stated on the record that he had not read the opposition papers filed by plaintiffs, and another appellate court judge asked a member of appellees-defendants counsel, " Don't you think plaintiff deserves his day in court ?"

REASONS FOR GRANTING THE PETITION

Both the District Court and the Circuit court either misapplied or made a mistake in applying a very well-settled doctrine of Federal Civil Procedure. In light of the overwhelming acceptance of the doctrine in question, and the fact that such a fundamental concept was violated, along with the great harm visited upon plaintiffs, the Supreme Court should grant certiorari to correct these mistakes.

In United States v. Diebold, Inc. 369 U.S. 654 (1962), the United States Supreme Court stated that:

"(o)n summary judgement the inferences to be drawn from the underlying facts contained in such materials [ie: evidence, including affidavits, exhibits, and depositions] must

be viewed in the light most favorable to the party opposing the motion." 369 U.S. at 655

This effectively sets the means by which appellate courts, and the Supreme Court itself, shall review summary judgement cases, under the guidelines of Federal Rules of Civil Procedure 56 (c), which states, in pertinent part:

> ...The [summary] judgement sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, along with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law...(emphasis added)

The Eleventh Circuit (from which this appeal is taken) has also endorsed this standard in several recent cases. See Mayo v Engel 733 F.2d 807, 808 (11th Cir. 1984); Borg-Warner Leasing v. Doyle Elec. Co., Inc. 733 F.2d 833, 835 (11th Cir. 1984); Pettinelli v. Danzig 722 F2d 706, 707 (11th Cir. 1984).

Every other Circuit Court has also adopted this standard of review. See, *intera alia*, Rogen v. Iliken Corp. 361 F.2d 260 (1st Cir. 1966); Bailey v. Hartford Fire Ins. Co. 566 F.2d 826 (2nd Cir. 1977); Kaufman v. Solomon 524 F.2d 501 (3rd Cir. 1975); Angel v Seattle-First Nat. Bank 653 F.2d 1293 (9th Cir. 1981). See Also Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d sec. 2716 and 6 Moores Federal Practice 2069.

In summary judgment before the third circuit, the common view is that summary judgment must be denied, at least if the averments "are well pleaded," and not supposititious, conclusory, or ultimate. Fredrick Hart & Co., Inc. v Recordgraph Corp., 169 F. 2d 580 (3rd Cir. 1948); United States ex rel. Kolton v. Halpern, 260 F.2d 590 (3rd Cir. 1958) The Third Circuit doctrine, which permits pleadings themselves to stand in the way of granting summary judgment operates as a true safeguard against erroneous, improper and

unfair use of the Summary Judgment Rules, as in the instant matter. The 3rd Circuit Doctrine also embraces the fairness concepts of the 4th and 5th amendments to the United States Constitution.

In light of this overwhelming authority, it is obvious that, in the instant case, the facts must be viewed in the light most favorable to the plaintiff (as opposer of the summary judgment motion). Further, if the facts so viewed show a genuine issue as to a material fact, the summary judgment must be reversed, and the case should be allowed to proceed to trial [1]

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[1] A District Court order granting summary judgement is not a matter of discretion, so is independently reviewable by the appellate court. For this reason, no deference is due the District Court's decision. See May v. Engel 733 F.2d 807 (11th Cir. 1984).

There are many genuine issues of material facts present in this case. One, deals with whether Plaintiff-Appellants and Defendant - Appellees formed a partnership. American Jurisprudence 2d states that:

"The intent of the parties is one of the most important tests of whether a partnership exists between purported partners...since partnership rests on mutual voluntary consent, manifested by the terms of the parties' agreement or their conduct under it." 59A Am. Jur. 2d Partnership sec. 148

Intent is a state of mind, that which shows a "design, resolve, or determination with which a person acts." 46 C.J.S. Intent, page 1103. Courts across the United States are in general agreement with State v. Walker 154 S.E. 866, which says that since intent is a state of mind, it generally must be inferred from the facts, 154 S.E. at 867.

Looking at the facts in the instant case in the light most favorable to the Plaintiff-Appellant, it is clear that a genuine issue

as to a material fact was present. Plaintiff-Appellants claim that the writing in of the words "**a partnership consisting of**" before the names of the parties to this action, by the senior officer (who is also an attorney) acting as the duly authorized agent for the Defendant-Appellees (App. C, D, H,), on the letter to L. Miller, the owner/seller, (hand dated 7/83) indicated May's **intent** to have **formed** a **Partnership**. Defendant-Appellees claim that this marking had no significance. Also, the partners' representations to third parties and actions, such as agreeing to share **profits** and **expenses** further (App.D 6, C.May) demonstrate the partners intent to form a partnership and the existence of that partnership. If this is not a genuine issue as to a material fact, it is quite difficult to imagine what would be considered as such.

There is overwhelming evidence that subsequent to the date on the letter a

partnership existed (App. C, D, H, I, J), so even if the letter acted to terminate the original partnership, the partnership was reformed by the many subsequent actions taken by the Parties. (App. C, D, H, I, K). In fact the same author of this purported letter referred to the **"Homart/Saber Partnership"** in later writings and documents (App. C, D, H).

Another fact that is in dispute, is whether a letter (App. L) was actually written and sent in the course of the relationship, as claimed by the Defendant-Appellees, or whether it was merely developed for use at trial and at the summary judgement hearing, as claimed by the Plaintiff-Appellant (App. H-1). Again, there exists a genuine issue of fact that was a central focus of the trial court's order. It seems that the courts involved in this case either did not examine all of the facts or simply refused to consider the facts presented by the evidence. In either case, the courts below have

frustrated the purpose of requiring a high standard of review before awarding summary judgment. United States v. Diebold, supra. Fed. R. Civ. Pro. 56 (c), Also see Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986). Fairness Concepts of 4th & 5th Amd. to the United States Constitution. The non-moving party has presented an abundence of evidence, omitted by the lower courts, which establish the existence of material factual disputes. Frishberg v. Esprit de Corp., Inc. 788 F. Supp. 793, 797 (S.D.N.Y.) 1991 In light of this ommitted evidence, this matter should be reversed.

The trial court stated that although it hadn't found a partnership, even if a partnership existed, it terminated when the property was sold to Cadillac-Fairview. As explained previously, (App. M-1, H, D) there never was a sale and whatever transaction occurred, it did not and could not terminate

the objectives of the Homart/Saber Partnership.

The United States Supreme Court has cautioned against casual uses of summary judgments, and had made clear that summary judgment must be used with a due regard for its purposes, ie: speeding the disposition of cases where there are No Facts In Dispute. The Court has also said, in the same case, that the summary judgement method should be *carefully* invoked to guard against improperly depriving a party of a trial of disputed factual issues. Associated Press v. United States 326 U.S. 1 (1945).

With the existence of the important disputed issues, it is essential to fundamental fairness that they be decided by a finder of fact (either a jury or a judge *sitting at trial*), and not merely by a cursory examination of the allegations.

Since the facts presented, viewed in the light most favorable to the Plaintiff-Appellants, indicate a genuine issue as to at least one material fact, the judgement of the lower courts should be reversed, and the case remanded to the District Court for trial.

A THE DECISION BY THE TRIAL COURT FAILED TO TAKE INTO CONSIDERATION MATERIAL FACTS AND IS NOT BASED ON THE ENTIRE RECORD.

In the matter at bar, the Supreme Court should grant certiorari and review the case at hand because 1).. the trial court failed to consider evidence which proves that the Defendant-Appellees operated as a partnership and that the parties invested funds in justifiable reliance of that partnership; and 2).. the trial court misinterpretated an agreement for sale to have the effect of a final sale in terminating the interests of the Homart/Saber Partnership. Appellate Courts will reverse a trial court when a trial court fails to take into account or omits material facts which demonstrate a

dispute as to genuine material issues of fact Peterson v Term Taxi, Inc. 429 F.2d 888 (2nd Cir. 1970) In Peterson supra, the appellant court held that "All the Facts and Circumstances of the case Must be Reviewed--" In Peterson citing Davis v United Fruit Co 402 F2d. at 331-332, the court said " A court must not let its zeal for a tidy calendar overcome its duty to do justice." The Peterson Case dealt with the much higher abuse of discretion standard rather then standards enumerated above for summary judgment. Nevertheless, the courts have consistently held that a trial court must review all of the material facts and that it cannot fail to consider or deal with facts which are material. May v. Engel, Supra page 13. Since the standard for summary judgment is less taxing then that of the abuse of discretion standard Peterson, supra, Diebold, Supra, certiorari should be granted in light of the fact that material facts were not considered by the lower courts.

B. THE COURT FAILED TO CONSIDER AND RECOGNIZE THAT PLAINTIFF'S PROFFERED SUBSTANTIAL EVIDENCE, THE DEFENDANT'S LETTER DATED MAY 7, 1984 [STATING THAT HOMART AND SABER WERE PARTNERS] WAS WRITTEN AND MAILED BY HOMART AFTER THE PURPORTED OCTOBER 6, 1983 LETTER WHICH APPELLANTS-PLAINTIFF'S ASSERT WAS PREPARED FOR TRIAL .

It has already been demonstrated that the legitimacy of the October 6, 1983 letter (App L) was questioned by appellants-plaintiffs but not even considered by the lower courts. However, what cannot be disputed is that the Defendant's own document, a letter dated May 7, 1984 (App. C) raises serious doubts about the legitimacy of the May 1983 letter (App.L). It is unlikely that a Senior Officer of defendant who is also an attorney would write a letter on October 6, 1983 instructing Saber to use the word **"a partnership to be formed"** (App L) and then on May 7, 1984, in his own hand writing, write in the words **"partnership of Homart and Saber"** and **"the partners will"** etc. (App. C,

D, H). At a minimum, the Defendants themselves contradict the letter and/or their position regarding a partnership. The May 7, 1984 letter and proposal (App. C) in which the party claiming there is no partnership states ...

" A PARTNERSHIP BETWEEN HOMART ANS SABER-- THE PARTNERS WILL HAVE SUBSTANTIAL RISK-- THE PARTNERS WILL INVEST 100,000 IN STUDIES, THE PARTNERS WILL MAKE A DEPOSIT--"

There is also deposition testimony by the parties with regard to and agreement to split profits and expenses augmented by representation to third parties and capital investments by the partners, establishing a Partnership from that point (**"May 7, 1984"**) forward, regardless of whether or not the October 6, 1983 letter(App L) was legitimate as claimed by Appellee-Defendant or a fraud as claimed by Appellant-Plaintiff (App H-1)

C. SABER DEVELOPMENT WAS THE ORIGINATOR OF THE SITE DEVELOPMENT.

Saber Development (as a result of the efforts of Diversified) made the original proposal for the purchase of the mall site prior to Homart's involvement or knowledge of this property (App H). On August 9, 1983, Saber offered Homart a 50% Partnership interest and Homart accepted. This created a fiduciary partnership or co-venture relationship between Homart and Saber which would last until the title right and interest to that mall site passed from Leonard Miller (the owner/seller) to a third party buyer. Since this did not happen until the secret purchase by Homart, [which violated Homart's fiduciary duty to Saber and the partnership agreement,] the objective of the partnership was only terminated by Homart' unlawful breach. The aborted agreement to sell the land to Cadillac-Fairview could no more constitute the sale of the land than an offer to buy a

stock constitutes ownership or sale of a share of stock.

Thus, the legal conclusions drawn by the trial court were misplaced. Unconsummated agreements to purchase realty, unless closed, never terminate a partnership's chance of acquiring a site. (App J Affidiavit of expert I.Wolf, H, K, M-1 Dep. L Miller). No legal theory could exist which allows for an agreement to buy land to be treated or characterized as an actual purchase and sale of land. The joint bids, the writing in of the words "partnership" by the party claiming there was no partnership, the 5 bids, the trips by the parties, and both parties' representations to third parties about the partnership, all demonstrate both parties intent to be partners. These acts all establish the elements of a partnership [common purpose, joint control or right of control, a joint proprietary interest in the subject matter, a right to share in the

profits] and the existence of a joint venture relationship Navarro v Espino, 316, So2d 646, 648, (3d DCA 1975), La Mar v. Lechlider, 135 Fla. 703, 185 So. 833 (Fla. 1939), Florida Tomato Packers, Inc. v. Wilson 269 So. 2d 536, 539 (3d DCA 1974), cert. denied, 327 So.2d 32 (Fla. 1976). Furthermore, the proposals to purchase the mall site which were jointly prepared and sent out by Saber/Homart, together with an agreement to share the expenses and profits on a 50%/50% (App. D-5 C. May) basis creates the requisite inference and conduct of a joint venture partnership . Kislack v. Dreedian, 95 So. 2d 510, 515 (Fla. 1957) also see Beckett v Pierce, 157 Fla. 184, 25 So. 2d 486, 489, Fla. (1946). The requisite intent is also present. Granik v. Perry, 418 F.2d 832, 836 (5th Cir. 1969), Everett v. Ribicoff, 200 F. Supp. 103, 111 (N.D. Fla. 1961). In the instant matter, all of the essential elements of a partnership existed, see Homart's own testimony.(App D,H). The singular piece of

paper which could raise an issue of doubt, as to intent of the parties, was the letter purportedly written by Chuck May of Homart on October 6, 1983. However, the legitimacy of this letter is in question.

What should have never been overlooked was the fact that even if the letter of October 6, 1983 (App L) was, arguendo, legitimate, the author of said letter, Chuck May sent another Letter **A FULL 7 MONTHS LATER** which in the Defendant's own handwriting, establishes a Partnership between the parties as of May 7, 1984 (App C, D), a fact which cannot be disputed. The lower court failed to consider additional evidence subsequent in time to the October 6, 1983 letter that clearly showed that a partnership existed (App C, D, E, F, H). This customary practice is clarified by the affidvit of one of the nations leading Shopping Center Developers, Iriving Wolf (App. J) and Stan Aber (App. K, H) and thus, the lower court failed to apply

a high standard of review most favorable to the non-moving party. Diebold, supra.

Another genuine issue of material fact is whether that partnership terminated. The trial court failed to consider or inadvertently overlooked the fact that the mall site was never sold to a third party. (App . K,D,E, F). Only the termination of the particular undertaking of the partnership (in the instant matter, the sale of the land to a another buyer) could terminate the objective of the partnership.

Fla. Stat. S620.71 (1) (a) (1987) The General Rule is -[i]f no date is fixed by the contract for its termination, the agreement remains in force until its purpose is accomplished or until such accomplishment has b become impracticable. (emphasis added).

Eagle-Picher Co.v. Mid-Continent Lead & Zinc Co., 209 F.2d 917, 919 (10th Cir. 1954); Maimon v. Telman, 40 Ill.2d 535, N.E. 2d 652, 655 (Ill. 1968); Southwest Drayage Co. v. Crawford Moving Vans, Inc., 377 S.W. 2d 293, 297 (Mo.1964).

Stan Aber testified that he was looking for a 50% joint venture partner and, after

approaching Mel Simon (a major developer) he approached Homart and Homart accepted.

What is really STRANGE about the May 7, 1984 Letter/Propsoal (App. C) is the fact that the writer testified he intended to **deceive** the seller into thinking Homart and Saber were a Partnership (App. D-2 -5, C. May Deposition) This is a preposterous and absurd notion. What May's testimony does prove, in his own words, is that he was either going to lie to the seller or perjure himself during the deposition (App. D-2 -5). At the very least, he must have lied at one or the other times. His testimony, therefore, regarding the October 6, 1983 letter (App.L) is highly suspect and the doubt should be resolved at trail, and not as a matter of law. It is crucial to note at this time that the facts and circumstances surrounding this mysterious letter are greatly in dispute. Plaintiff Aber emphatically stated in his deposition (page 122 see App. H-1) that he did not recall ever

receiving that letter and thinks that "perhaps it was created for this case". Aber stated he would have called immediately to protest such a letter and Welcome testified he "never received any such call" (App. E) The Secretary who allegedly prepared the October 6, 1983 letter did not remember typing it, nor taking it to Mr. Welcome, or whether it was ever picked up by a mail boy. (App.G Ms. Dunvack). What is even more curious is that Defendant's house counsel had lunch with the secretary the day before her deposition, as well as conversations with her after the subpoena, and that two other attorneys for Defendant-Appellee Homart interrupted the secretary (Ms. Dunback) to bring her outside for a consultation just before answering questions about the letter (App. G 1-2). There certainly is a genuine issue as to a material fact regarding this letter and, the course of conduct practiced by Defendant-Appellees.

Other cases on point which support the fact that a partnership was formed by Saber and Homart and that it was never terminated are:. Freese v. U.S. 455 F2d 1146, cert. den. 93 S. Ct. 85, 409 U.S. 879, 32 L.E.d. 2d 134. Also see Frazell v. U.S., 213 F. Supp. 457, rev. 335 F .2d 487, reh. den. 339 F .2d 885, cert. den. 85 S. Ct. 1104, 380 U.S. 961, 14 L. Ed. 2d 152, on Remand 269 F. Supp 885. There was never a dissolution or termination of the partnership formed because the land was never sold. It is a presumption of law that a partnership continues until its goal is permanently terminated, as a matter of law. Uniform Partnership Act, Florida Statutes Chapter 620.

Irrefutable proof that the mall site was not sold to a third party is the fact that Defendant-Appellees purchased the land themselves. (App. C, H, E, F).

Defendant-Appellees also claim no formal written Partnership existed because no formal partnership agreement existed. It is important to note that forming such agreements orally and then operating as a partnership pursuant to such oral agreements is the customary and normal practice of mall developers (App. J expert I. Wolf, K). In fact, Homart invited Edward Debartolo to jointly purchase the mall site and, actually made the purchase as joint venture partners without **any formal partnership agreement** [emphises added]. (App. E-1 R. Welcome, F-1 Olieor,). Thus, they cannot now claim this is not a common practice and "term of art" of mall developers (App. D, E, F, H, J, K). It is settled law that the existence of a partnership is a matter of contract, and no particular form of contract is necessary to create the entity known as partnership. Adams v U.S., 328 F. Supp. Continuation of the partnership in the instant matter would exist until the mall site was sold and title,right,

and interest was transferred from the seller to a third party. Allen Chase & Co. v. White Weld & Co. 311 F. Supp. 1253, F.S. 620.71 (1) Florida Statutes). A partnership once established is, in the absence of anything to indicate its termination, presumed to continue to exists. Also see Cases and authorities cited at 59 Am Jur 2d, Partnerships, Section 30., See 8 Fla. Jur. 2nd, Business Relationships, Section 561, 559.

Since the joint venture existed and was never terminated, there existed a fiduciary duty between the partners, Homart and Saber. Granik v. Perry, 418 F.2d 832, 836 (5th Cir. 1969); Donahue v Davis, 68 So 2d 163, 171 (Fla. 1953). The partnership existed and never terminated, until Homart violated its fiduciary duty to its partners Saber. Questions regarding the fiduciary duty owed by the partners created a genuine issue of material fact in dispute which the court

failed to consider. Beckett v Pierce, supra, Johnston v Eichelberger supra, Deauville Corp v. Federated Dep't Stores, 756 F.2d 1183, 1194 (5th Cir. 1985) Miller v. Butterfield, 79 Cal. 62, 21 P. 543 Cal. 1889). When Homart learned that the deal with Cadillac-Fairview expired, it had a fiduciary duty to its partner, Saber, and to inform the partnership that the mall site was still available for purchase and it had a fiduciary duty to its partner, which it breached, by forming a new partnership with the same objectives as the old partnership, without telling Saber, its original partner, that it was terminating the partnership. Belcher v. Birmingham Trust Nat. Bank, 348 F. Supp. 61, stay den. 395 F2d 685. Since the lower courts failed to consider this fiduciary duty, it failed to consider **genuine issues of material facts** and to use a high standard of review.

The trial court also stated that 29 months had elapsed between Saber's contact with Homart App B-4). The court failed to consider that Saber and/or Diversified was in contact with Homart every 6 months (App H, 2,3,4,5,) and that Diversified was also in contact with the buyer and Saber. (App. I). Diversified maintained frequent contact with Saber and Leonard Miller (owner/seller) and was aware of the possibility that the Cadillac-Fairview deal might not close. (App. I). These facts were simply omitted or ignored by the lower courts.

CONCLUSION

This case presents "special and important reasons" (Supreme Court Rule 10) for granting a Petition for Certiorari. As is evident from the Statement of Facts set forth herein, there has been a gross miscarriage of justice when the Trial Court failed to consider material facts proffered by Appellant-Plaintiff and; in misinterpreting or failing to consider common terms of the mall development business and: by the appellate court's failure to independently review the record.

Summary Judgement was neither proper nor appropriate in this case and should never have been granted by the trial court, nor should the judgment have been affirmed by the Court below.

Material facts were completely ignored, and these facts, no matter how they may have been viewed, could not, by any stretch of the imagination, support the standards set by this Court in all the many holdings previously announced with respect to the granting of Summary Judgment and the basis for authorizing such an award.

What is also at stake, however, is what this case represents on a broader scope. If a district court acts erroneously, and the appellate court fails to correct such error, we have allowed our trial judges unfettered discretion to abuse the litigants who come before the bar of justice, and to misuse their tremendous powers.

The harm and injury that thereby befalls the losing party is beyond redemption, and we're left with the sort of injustice that we revile so when we examine other legal systems in the global sense.

We are not making a statement that we simply disagree with the lower courts, but that there has been such a departure from the most basic tenets of law, as we have studied it, that some redress is in order. For these reasons, we have come before the highest tribunal in the land with the hope and faith that the system still works and that the parties involved will be allowed their day in court at a trial on the merits, after all.

For the reasons and authorities enumerated above, we respectfully submit that the Petition for Writ of Certiorari should be granted accordingly.

RESPECTFULLY SUBMITTED,

LIONEL BARNET, ESQUIRE
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(305) 443-7887
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Florida Bar # 122317
Attorneys for Appellants

Dated: December 7, 1992

NO

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DIVERSIFIED INVESTMENT PROPERTIES, INC.
AND SABER DEVELOPMENT CORPORATION

PETITIONERS

V.

HOMART DEVELOPMENT COMPANY

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI OF PETITIONERS DIVERSIFIED INVESTMENT PROPERTIES, INC. AND SABER DEVELOPMENT CORPORATION

LIONEL BARNET,
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(305)-443-7887

Lionel Barnet.,
Counsel of Record

Charles Mindlin
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RE: 90-5988

DIVERSIFIED INVESTMENT PROPERTIES, INC
a Florida Corporation and
SABER DEVELOPMENT CORPORATION,
a foreign corporation,

Plaintiff-Appellant,

versus

HOMART DEVELOPMENT COMPANY,
A Foreign Corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: HATCHETT, Circuit Judge, JOHNSON and HENDERSON*, Senior Circuit Judges.

PER CURIAM:

Affirmed. See Circuit Rule 36-1.

* See Rule 34-2 (b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88:-6724-CIV-ROETTGER

ORDER

DIVERSIFIED INVESTMENT PROPERTIES,et. al.

Plaintiff

V.

HOMART DEVELOPMENT COMPANY,

Defendant.

THIS CAUSE is before the Court on motion of Defendant HOMART DEVELOPMENT COMPANY for Final Summary Judgment. Upon consideration of the motion, the oral arguments of counsel at the hearing held for this motion on September 10, 1990 and the record in this cause, it is

ORDERED AND ADJUDGED that the motion of Defendant HOMART DEVELOPMENT COMPANY for Final Summary Judgement is GRANTED as to Plaintiff DIVERSIFIED INVESTMENT PROPERTIES. Under Florida law, when a broker abandons his

efforts in connection with the sale of property, any contract of employment is terminated. Shuler v. Allen 76 So. 2d 879 (Fla. 1955) (broker abandoned listing contract because the broker failed to contact the owner for nineteen months). In this case, contact between DIVERSIFIED INVESTMENT PROPERTIES and HOMART DEVELOPMENT COMPANY lapsed for a period of twenty-nine months after the seller of the property at issue in this case rejected the offer by HOMART DEVELOPMENT COMPANY and SABER DEVELOPMENT CORPORATION. Therefore, the plaintiff DIVERSIFIED INVESTMENT PROPERTIES abandoned its duties for twenty-nine months terminating any relationship which may have existed between Plaintiff and Defendant. Plaintiff has failed to come forward with "specific facts showing that there is a genuine issue for trial. " Celotex v. Catrett, 477 U.S. 317, 324 (1986).

FURTHER ORDERED AND ADJUDGED that the motion of Defendant HOMART DEVELOPMENT COMPANY for final summary Judgment is GRANTED as to Plaintiff SABER DEVELOPMENT COMPANY. In determining the existence of a partnership, an important test is the intent of the parties. Granik v Perry 418 F.2d 832 (5th Cir. 1969). The parties in this action did not intend to form a partnership. In correspondence dated October 6, 1983, Richard Welcome, First Vice President for Defendant stated to Stanley I. Aber, President and Chief Executive Officer of SABER DEVELOPMENT COMPANY, that no reference should be made to an existing partnership. Thereafter, SABER referred to the relationship of the parties as a partnership to be formed.

Further, Fl. Stat. S 620.71 (1) (a) states that dissolution of a partnership can be caused "by the termination of the definite

term or particular undertaking specified in the agreement."

Any agreement between the parties was to obtain the property in question. Therefore, the relationship existing between the parties was dissolved by the rejection of their offer by the sellers of the property in question and the ensuing lapse of the contract between the parties for twenty-nine months.

DONE AND ORDERED this 29, day of October, 1990.

NORMAN C. ROETTGER, JR.
UNITED STATES DISTRICT COURT JUDGE

cc: counsel of record

Draft to: Leonard Miler
Re: Pines & Flamingo Road
Dear Leonard:

"**A PARTNERSHIP CONSISTING OF** "[the underlined was hand written by Senior V.P. who is an attorney of defendant Homart] Saber Development, the Pennsylvania Real Estate Trust and HOMART DEVELOPMENT COMPANY, a wholly owned subsidiary of Sears Caldwell Banker Group) is interested in acquiring 100-120 acres of commercially zoned property that your group controls at the intersection of Pines Boulevard and Flamingo. We are prepared to make the following offer:

Purchase Price: $600,00 per acre during first year, $65,000 per acre during second year, $70,000 per acre during third year

Down Payment: $100,000. at commencement of contract period or at closing.

Mortgage: Seller to take back Mortgage after closing for three years at 10% interest.

Purchase Contract and down payment are subject to the following conditions:

1) Reconfiguration and replatting of the 100-120 commercial acres to allow for development of a regional shopping center.

2) DRI approval by State and Local Agencies.

3) Highway access Satisfactory to purchaser for a regional shopping center.

4) Soil test analysis that show that other than the reasonable stripping, fill and surcharge requirements, 2-4 story buildings can be built on the property.

5) Signing of at least two major department store commitments.

Leonard , we will need 90x 120 [added by hand by defendant VP, Atty.] days before the above agreement goes into effect to control the property and during this time, to provide the necessary preliminary information such as market studies, traffic studies and meeting with the state and local authorities and to obtain approval of the various boards of

directors of **the PARTNERS** [underlined words were all added to document, by hand, by Homart's Senior V.P. who is also an attorney and who now claims no partnership existed see App. D].

During this 120 day period **the PARTNERS** would **spend** between $50,000. and $100,000. on studies. During the contract period an additional $150,000. to $200,000. would be spent in getting all approvals and department store commitments. **The PARTNERSHIP** would thus have **substantial funds at risk.**

[Entire last paragraph referring to Partners, etc. added by hand, by Chuck May, Senior V.P. of Homart who, also, happens to be an attorney.]

CALDWELL BANKER, Commercial Real Estate Services
A DIVISION OF COLDWELL BANKER-COMMERCIAL GROUP, INC.

CHARLES H. MAY, II
Vice President, Marketing Director
Regional Shopping Center Services

May 7, 1984

Mr. Stanley I. Aber
Saber Development Corporation
123 East 54th Street
New York, New York 10022

Re: Pembroke Pines Property

Dear Stan

Per our telephone conversation, I have enclosed a copy of your letter to Leonard Miller with my comments. It is important that we begin negotiations with this group, so that they know we are serious. As my comments indicate, I suggest we go in with a $70,000.00 per acre price with $500,000.00 down at signing of contract, $1,500,000.00 additional at closing with the sellers carrying back a $5,000,000.00 mortgage at 10%. The other conditions for closing that you have indicated I believe are appropriate, but may require some compromising if we are to make this deal.

Yours very truly,
Charles H. May, II

Q So you are telling me that it was your opinion that at the time that there was in fact no partnership in existence between Homart and Stan Aber or Saber Development Corporation, is that correct?

A There was no partnership in existence

Q As the result of your opinion, that there was no partnership in existence, did you voiced that feeling to Stan Aber immediately after receiving a copy of that letter?

A No, how could I? I put those words in there.

Q You put those words in there?

A Yes. You know I did.

Q Well, I may know what you did and didn't do, but the record doesn't, so you have to tell me, okay?

A Well, why don't you just ask me if I put the words in there?

Q I am getting to that.

Q All right, who wrote those words?

A I did.

Q Okay. So the word "PARTNERSHIP" IS YOURS, correct?

Q. It is.

Chuck May Page 50

Q. Q. So in other words, what your are telling me is, that part of that letter is untrue?

A. Part of the letter is not fully correct. It was the intent that once the property -- that an offer was accepted that a partnership would be negotiated and therefore the purchase contract , which would follow this letter, and subsequently the acquisition of the property would be done by a partnership.

Q. Was it your intention at the time that was sent out to mislead the sellers as to the nature of your arrangement with Stan Aber and /or Saber Development Corp.?

A. In terms of what?

Q. In terms of wanting them to believe that

there was a partnership between the two corporate entities when in fact you told me there wasn't?

A. I wanted them to know that the contract

would be with a partnership of Saber, Homart, Pennsylvania Real Estate Trust and Saber.
Chuck May Page [57]

Q. Do you recall whether or not you voiced that opinion to Stan Aber prior to the date of the letter which you are presently holding, which is Exhibit 16.

A. In terms-- I don't understand your questions

Q. Well, did you write to him or call him on the phone and say, "hey Stan, I don't want you to use the word Partnership in this letter?

A Well, I had done it in a letter that was sent out approximately 2 weeks before this. -- So at this point-- I probably didn't object at that point.

Q. You did it in a letter sent out approximately two weeks before September 22?
A. No, no. I used the-- I inserted the word "Partnership" in the September 7th letter.

This is only two weeks later he uses the word "partners:. He and I both understood that we were using them as meaning the group that would eventually be formed in order to take down the property.

Chuck May Page [69]
As far as you can recall there was never any discussion concerning a division of profits?

A. It came-- to characterize it as a discussion is my problem

Q However you want to characterize it?

A There were references by Stan that his understanding was that he and the Pennsylvania Real Estate Trust would represent **50 percent** of the partnership to be formed and that Homart would represent the other **50 percent**.

Q And that the profits would be distributed accordingly?

A The **profits** would be distributed **50 percent** to Homart and **50 percent** to the Pensylvania Real Estate Trust Saber.

Q. And that was strictly pursuant to oral discussions between you and Stan Aber?

A Yes.

Chuck May Page [72]

Q. So in the first paragraph of the attachment where it says quote " a partnership consisting of "unquote, those words are in your handwriting, correct?

A. Yes, as I told you before, that is mine.

Q. Okay, why did you write those specific word into the proposal?

A Well, as I told you before--

May Deposition page [73]

Q Okay. So you are telling me that even though you yourself wrote in the word, quote, "Partnership" unquote, that in fact you did not believe there was a partnership at that time between Homart and Saber, right?

A It was a partnership to be formed

Q But the letter doesn't say that, does it?

A It would not appear to say that, no

Q What does the second line of that letter say? I can't read the entire line. -

A He had put-- Stan had put Homart Development Company slash Coldwell Banker and I had put in parens, (a wholly owned subsidiary of Sears' Coldwell Banker Group).

Q it then read as it now reads, quote, " a partnership consisting of Saber development, Pennsylvania Real Estate Investment Trust

Q. Well, I don't know. Did the agreement entered into between Homart and Debartolo provide that the property would be acquired by way of a joint venture between the two corporations?

Q You asked me that question before and I don't recall whether we acquired it and transferred it into a joint venture or it was acquired directly by the venture.

Q Okay. Let me ask you this. As of the date of Exhibit 40, which I believe is April 30, 1987, had Homart and DeBartolo by that time entered into the formal partnership agreement that you told me about before?

A No, we had not signed a partnership agreement.

Q So as of the date of Exhibit 40 there was no signed formal written partnership agreement between Debartolo and Homart?

A That's correct.

Q. That was my next question. Prior to the acquisition of the property by Homart, was there any type of written joint venture and/or partnership agreement between Homart and the Debartolo organization for the development of the property ?

Q Formal Agreement? Not that I know of.

Q Well, you may mean one thing by formal agreement. I may mean another. When I say agreement, I mean a written document.

A Not that I recall.

Q Okay. So, as far as you know, at that time, and when I say at that time, I mean prior to the formal joint venture partnership agreement with Debartolo, the only agreement or understanding would have been oral in nature?

A I believe so.

Q Okay. did there come a time subsequent to the acquisition of the property by Homart when Homart and the Debartolo organization entered into a formal written joint venture agreement?

A. Yes.

Dunback Deposition Page [48]

Q. Do you recall specifically typing this letter, Demback Exhibit No. 1, formerly Defendant's Exhibit No 187

Mr. Hpert: Same Objection as to ambiguity of question.

Q. You may answer. The cogent word in this, and recalling that you're under oath, is specifically typing this letter?

A. No.

DunBack Deposition page [43]

Q. Do you specifically recall taking Dumback Exhibit No. 1 Defendant's exhibit 18 into Mr. Welcome's office for his signature?

A Not specifically.

Q. Thank you. Do you specifically recall typing an envelop relating to this particular letter?

A. Not specifically.

Q. Mr. Aber, I show you a letter dated October 6, 1983, from Rich Welcome, and ask you if you can identify this letter?

A I don't recall ever receiving this letter.

Q You have never seen it before today?

A I saw it when we asked for the disclosure of documents from your group.

Q And that was the first time you ever saw that letter?

A That was the first time;' that's correct.

Q Do you have any explanation for why Homart would have a letter in its file that you had never seen?

A Perhaps it was created for this case.

Q. And that's your best explanation?

A That's the best explanation I can come up with.

Q Let me show you a letter dated November 18, 1983 which we will mark as Exhibit 19, and ask you if you can identify same?

Stan Aber of Saber Development Page [152]

I was trying to stay on top of finding out what's happening to that property, and at that time he said he's happy with Cadillac -Fairview, and that was it.

Q Did you do that personally or by telephones?

A Telephones

Q On how many occasions did you make such telephone calls?

A Twice that year.

Q And on both occasions he told you the same think?

A That's correct.

Q Was there anything else discussed during those telephone conversations? A There may have been. I think I talked to him about stock in his company, what was happening. Q Which company was that?
A American Savings and Loan. It's called American Savings and Loan.

Q Other than those three conversations, did you have any other communications with anyone from the seller group since June of 1984?

A. It was 85-- oh, other than those three occasions not that I remember.

Saber Deposition [155]

Q. Now, during the period from October 1984 up to the present, did you personally have any communications with anybody other than Mr. Froom concerning the Pines/Flamingo site?

A Yes, I met many times with Chuck May and Rich Welcome over a period of time, and we talked about the site that got away, and told them that we were interested in keeping our partnership going and they never said anything to the contrary.

And that I told them was interested in the site and they said they would be interested in the site, and then I was-- because we had another venture that we were involved with at Shore Mall in Atlantic City, and I had number of conversations with Rich Welcome, so I was very disappointed and shocked when they made the deal without me.

Stan Aber of Saber Deposition Page [167]

Q When was the last time you saw Mr. May with regard to the Pines/Flamingo site or spoke to him?

A I spoke to him last-- I spoke to him , I guess, I am trying to think, in 87 at a shopping center convention , 19-- May 1987. H-3

Q Prior to that shopping center meeting , when was the last time you spoke to him?

A I would run into him at shopping center conventions and we would chat about the area, and our interest in pursuing the site.

Q Was he still interested as you would meet with him from time to time in discussing g the Pines/Flaming site?

A There was no doubt in our additional conversations from 84 on now Sears had it in their scope of doing business that they were prepared to locate in that Pembroke Pines area, so it was obvious that a site in that area would attract the interest of Sears and Homart.

Saber Deposition page [178]

Q. After June of 1984, what is the fist communications you had with Rich Welcome after the meeting that occurred with the seller group?

A We were working on another property called Shore Mall, and that may have been a period between 85, 86.

Q during the 85,86 period when you were working with him concerning the other piece of property, did you discuss with him the :Pembroke/Flamingo site?

A. YES

Q And what did he say to you about those?

A He said we are very interested in that site, we would like to do it.

Q. And when was that?

A That was 19-- had to be the end part of 85, and the beginning of 1986.

Q What is it.

A. It is an article that was in the Miami Hearald on April 13th, 1986.

Q. And why was that article significant to you? You produced it this morning?

A. Yes, it just-- I just wanted you to know that I was constantly keeping abreast, to the best of my capabilities, as to what was happening with the site or sites in the area, and the site is discused in the Article.

AFFIDAVIT OF IRVING WOLF

STATE OF CALIFORNIA)
COUNTY OF LOS ANGLES)

BEFORE ME the undersigned authority personally appeared IRVING WOLF, who after being duly sworn deposes and says:

1. That my name is Irving Wolf and my Curriculum Vitae is attached hereto.

2. That I have a general familiarity with the facts of this case in that I am aware of the fact that the property which is the subject matter of the alleged partnership came under the control of Cadillac-Fairview when the placed a deposit on said property. I am also aware of the fact that, due to litigation between Cadillac-Fairview and the sellers, the property eventually became re-available. Subsequent to the property becoming re-available, I understand that Homart purchased the property unilaterally and thereafter entered into a partnership

agreement with DeBartolo Organization to construct the mall in question. I am also aware of the fact that Homart is claiming that if, in fact, there was a partnership agreement between Homart and Saber Development, that said partnership agreement allegedly terminated upon Cadillac-Fairview's taking control of the property.

3. That based upon my experience in developing projects of this type as outlined in my Curriculum Vitae, it is my opinion that Homart's claim that the partnership, if any, ceased upon Cadillac-Fairview's taking control of the property is not valid. In fact, it is not unusual at all in situations of this type for a number of corporate entities to temporarily tie up an acquisition site only to see that site become reavailable due to disagreements or other problems which may develop between the parties. Therefore, in my opinion, the arrangement between Homart and Saber Development did in no way terminate

merely because the property temporarily became under the control of Cadillac-Fairview.

4. In addition to the above, I would also point out that I find nothing whatsoever unusual in the fact that the alleged partnership agreement between Homart and Saber Development was not in writing. In fact, it is quite common in this business for partners to operate strictly on an oral basis prior to the acquisition of the property.

FURTHER AFFIANT SAYETH NAUGHT.

xIrving Wolf
IRVING WOLF

SWORN TO and SUBSCRIBED before me
this 5th day of March, 1990

Sharon D. Done
NOTARY PUBLIC

My Commission Expires July 13, 199

IRVING WOLF
President
Irving Wolf & Associates
1221 Ocean Avenue
Santa Monica, California 90401

I Professional Career

Irving Wolf & Associates
Santa Monica, California
President, 1978 to Present

The company specializes in all areas of shopping Center Industry: including Leasing, Development, Operations, Management and the Marketing of Shopping Centers.

In addition, Mr. Wolf has consulted with market research and site locations firms, lending institutions, and retailers. He has also served as a frequent expert witness in numerous court cases in various states.

Monumental Properties, Inc.
Baltimore, Maryland
Executive Vice President, 1950-1978

One of the first firms to enter the Shopping Center Industry, the company developed, leased and managed over 20 regional shopping centers before it was sold in 1978.

II. Education

B.A.; Northwestern University
Attended University of Chicago for graduate studies

Certified Shopping Center Marketing Director
Certified Shopping Center Manager

Trade Association Memberships

III Member of the International Council of Shopping Centers. In 1987 Mr. Wolf received the first Distinguished Service Award granted for the ICSC Board of Trustees. This award has only been given to 7 people in the Shopping Center Industry.

Shopping Center World Advisory Committee

IV Seminars Conducted

Mr. Wolf has served on numerous panels for the ICSC, including teaching at the Management, Marketing, and Leasing Institutes, University of Shopping Centers where he serves as Dean of the Faculty, Spring and Fall Conventions, as well as Lecturer at UCLA and Columbia University.

AFFIDVIT OF STANLEY ABER

The money expended by both parnters which included research reports, aerial phots, travel, lodging, and consultants was done with the clear understanding that the parnership would continue to seek the property for the benefit of the joint venture partners.

On November 18, 1983 I wrote a leteter in which I referred to a partnership to be formed which meant the final legal document. This is customeary and typical in regional mall development. When our parnership's offer becomes accepted by the seller, then the parternship creates a mor formal document. The partners are still partners with or without the more formal document unless one is unwilling to proceed for their own nefarious reasons.

FURTHER AFFIAVNT SAYETH NAUGHT.

Stanly Aber
STANLEY ABER

SWORN TO and SUBSCRIBED before me
this 8th day of March , 1990

Dorthy Roner

Noary Public
My Comm expires
Dorotht Rosner
Nootry Pulbic, Stae of New York
No. 03-4730719

HOMART DEVELOPMENT CO.

OCTOBER 6, 1983

Mr. Stanely I. Abr
Saber Development Corp.
123 East 54th
New York, NY 10022

Re: Pines Boulevard and Flamingo Road
(West Hollywood, FL)

Dear Stan:

In reviewing your September 7th letter to Leonard Miller which Chuck May copied me on, you refer to " a partnership consisting of Saber Development... and Homart." No reference should be made to an existing partnership.

If we get closer to the point where you and Chuck May feel that it is possibel to negotiate a deal, we will need to discuss a partnership at length.

Sincerely

Richard Welcome

RW/pjd
cc: Chuck May

Richrad Welcome
First Vice President
Regional Mall Development

Q. In other words, just so I understand you correctly, the contact with Homart subsequent to the property becoming re-available, was initiated by Homart, as opposed to being initiated by yourself, or your associates; is that correct?

A It was initiated by Homart.

No. 92-1092

in the Supreme Court of the United States

OCTOBER TERM, 1992

DIVERSIFIED INVESTMENT PROPERTIES, INC. AND SABER DEVELOPMENT CORPORATION,

Petitioners,

v.

HOMART DEVELOPMENT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent
*Counsel of Record

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SUMMARY OF ARGUMENT

This case presents a question of whether state law has been applied correctly by a federal court sitting in diversity jurisdiction. Accordingly, it does not present any federal question that justifies exercise of this Court's jurisdiction to review by writ of certiorari.

ARGUMENT

Petitioners ask this Court to exercise its discretion to review a summary judgment grounded on state law claims that they had asserted against Respondent. Two federal courts have already determined that the state law claims are meritless. Dissatisfied with those holdings, Petitioners now seek further review.

Petitioners brought this action in Florida state court, asserting brokerage and partnership relationships with Respondent. Respondent, an out-of-state corporation, removed to the United States District Court for the Southern District of Florida. On Respondent's motion for summary judgment, the District Court found no genuine issue of material fact as to whether, under Florida law,

(1) the broker's contract of employment had terminated;

(2) a partnership had been formed; and

(3) the claimed partnership had terminated.

Accordingly, the District Court entered summary judgment against Petitioners. (Petition, Appendix ("App.") B). The Court of Appeals for the Eleventh Circuit affirmed without opinion.[1] (App. A).

The Petition, which seeks review of the summary judgment, does not raise an issue worthy of this Court's attention. *Cf.* U.S. Supreme Court Rule 10. Instead, Petitioners simply ask this Court to second-guess the District Court and Court of Appeals in

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[1]Petitioners contend, without support, that the Court of Appeals failed to make an independent review of the record. (Petition, pp. 9, 35). This contention is unfounded. In affirming the District Court's findings, the Court of Appeals cited its Local Rule 36-1, which provides for affirmance without opinion when the court determines that summary judgment is supported by the record and that an opinion would have no precedential value. (App. A-1).

their interpretation and application of settled Florida law in a routine commercial dispute. For obvious reasons,

> this Court must necessarily depend upon the district courts and courts of appeals for initial determinations of questions of state law; indeed, [the Court's] practice of deference to such determinations should generally render unnecessary review of their decisions in this respect.

Cort v. Ash, 422 U.S. 66, 72 n.6 (1974); *see Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("standing alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review").

As the District Court's opinion reveals (App. B), Petitioners' garden-variety state law claims were properly dismissed under Florida law, and do not warrant further consideration.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

Alan T. Dimond*
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